

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 05-N-04191-PEM
)	
ROGER ALLEN GERDES,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 158701,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

This matter was initiated by the filing of a Notice of Disciplinary Charges (“NDC”) by the State Bar of California, Office of the Chief Trial Counsel (“State Bar”), alleging that respondent Roger Allen Gerdes (“respondent”) wilfully violated Business and Professions Code section 6103 by failing to file an affidavit of compliance with rule 955 of the California Rules of Court as he was ordered to do by the California Supreme Court. The State Bar was represented throughout most of this proceeding by Deputy Trial Counsel Fumiko Kimura (“DTC Kimura”). Respondent did not participate in this proceeding either in-person or through counsel.

For the reasons stated below, the court finds that respondent wilfully failed to comply with rule 955 of the California Rules of Court and thereby violated Business and Professions Code section 6103. The court therefore recommends that respondent be disbarred from the practice of law and that he be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007(c)(4).

PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the State Bar’s filing of a NDC against respondent on November 18, 2005.

A copy of the NDC was properly served upon respondent on November 18, 2005, by certified

mail, return receipt requested, addressed to the official membership records address (“official address”) maintained by respondent pursuant to Business and Professions Code section 6002.1, subdivision (a).¹ A “courtesy”² copy of the NDC was also served on respondent on that same date addressed to P.O. Box 871, Carpenteria,³ CA 93014 (“the P.O. Box address”) and to 8564 Echo Drive, #3, La Mesa, CA 91941 (“La Mesa address”). The copy of the NDC sent to respondent at his official address was returned to the State Bar by the United States Postal Service (“USPS”) on December 6, 2005, bearing the stamp: “UNABLE TO FORWARD.” The copy of the NDC sent to respondent at the P.O. Box address was not returned by the USPS as undeliverable or for any other reason. The copy of the NDC sent to respondent at the La Mesa address was returned on or about November 28, 2005, by the USPS, and on the envelope was written, “Return to Sender - Not at this address - ever!”

On December 1, 2005, a Notice of Assignment and Notice of Initial Status Conference was filed in this matter, setting a telephonic status conference for January 3, 2006. A copy of said notice was properly served upon respondent by first-class mail, postage fully prepaid, on December 1, 2005, addressed to respondent at his official address. The copy of said notice was returned to the State Bar Court by the USPS bearing the label:

RETURN TO SENDER
NOT DELIVERABLE AS ADDRESSED
UNABLE TO FORWARD

On January 3, 2006, the court held a telephonic status conference in this matter. Respondent failed to participate either in person or through counsel at the status conference. Thereafter, on January 4, 2006, the court filed a Status Conference Order indicating that this matter was to proceed

¹Although the Declaration of Service by Certified Mail attached to the NDC indicates that the copy was addressed to respondent at his membership records address in Carpenteria, CA, rather than Carpinteria, CA, the court finds the misspelling of respondent’s membership records city de minimus and a harmless error. The court finds no due process issues in this matter and finds that respondent was properly served with the NDC.

²See Declaration of Service by Certified Mail attached to the NDC.

³Note the misspelling of Carpinteria with respect to the service of this copy as well.

by default. A copy of said order was properly served upon respondent by first-class mail, postage fully prepaid, on January 4, 2006, addressed to respondent at his official address. The copy of said order was not returned to the State Bar Court by the USPS as undeliverable or for any other reason.

Efforts by the State Bar to contact respondent were unsuccessful. As of January 26, 2006, respondent had neither contacted the State Bar nor had he filed or served a response to the NDC.

As respondent did not file a response to the NDC as required by rule 103 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), on January 27, 2006, the State Bar filed a motion for the entry of respondent’s default. The motion advised respondent that once the court had found culpability, the State Bar would recommend respondent’s disbarment. The State Bar also requested in its motion that the court take judicial notice of respondent’s official membership records address and the court’s official file in this matter. The court grants the State Bar’s requests. Also included with the motion was the declaration of DTC Kimura and Exhibits 1-6. The court admits these exhibits into evidence. A copy of said motion was properly served upon respondent by certified mail, return receipt requested, on January 26, 2006, addressed to respondent at his official address. A copy of the motion was also served upon respondent by regular mail on January 26, 2006, addressed to respondent at the P.O. Box address and the La Mesa address.

When respondent failed to file a written response within 10 days after service of the motion for the entry of his default, on February 14, 2006, the court filed an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders. A copy of said order was properly served upon respondent on February 14, 2006, by certified mail, return receipt requested, addressed to respondent at his official address. The copy of said order was returned to the State Bar Court by the USPS stamped “UNCLAIMED” and bearing a label which read:

RETURN TO SENDER
OTHER REASON
UNABLE TO FORWARD

The street address had also been crossed through and “Box 871” had been handwritten on the envelope next to the crossed out street address.

On March 1, 2006, the State Bar filed a brief on the issues of culpability and discipline and requested the waiver of the hearing on this matter. The court admits into evidence State Bar Exhibits

1-6 attached to said brief.

This matter was submitted for decision on March 6, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴

Respondent was admitted to the practice of law in the State of California on June 8, 1992, was a member at all times pertinent to these charges and is currently a member of the State Bar of California.

On January 25, 2005, the Hearing Department of the State Bar Court issued a decision in case number 03-O-03634; 03-O-03710; 03-O-03797-PEM finding respondent culpable of five counts of misconduct and recommending to the Supreme Court that discipline be imposed against respondent. Respondent failed to appear or participate in the matter, which proceeded as a default.

On January 25, 2005, the Hearing Department's decision was properly served by mail upon respondent at his official State Bar membership records address. On January 25, 2005, a courtesy copy of the Hearing Department's decision was also served upon respondent at the following address: P.O. Box 871, Carpinteria, CA 93014-0871.

On June 16, 2005, the California Supreme Court issued an order effective July 16, 2005, imposing discipline on respondent in Case No. S132783 (State Bar Court Case No. 03-O-03634; 03-O-03710; 03-O-03797). The June 16, 2005, Supreme Court order provided that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate respondent's actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

The June 16, 2005, California Supreme Court order further ordered respondent to comply with rule 955 of the California Rules of Court ("rule 955) and to perform the acts specified in subdivisions (a) and (c) of rule 955 within 30 and 40 days, respectively, after the effective date of

⁴As respondent's default was entered in this matter, the factual allegations contained in the NDC are deemed admitted pursuant to rule 200(d)(1)(A) of the Rules of Procedure. The findings of fact are therefore based on the deemed admissions as well as the exhibits attached to the State Bar's motion for the entry of respondent's default and the State Bar's brief on the issues of culpability and discipline.

the California Supreme Court order.

On or about June 16, 2005, the Clerk of the California Supreme Court properly served upon respondent a copy of the June 16, 2005, order. Respondent received a copy of the June 16, 2005, California Supreme Court order.

Rule 955, subdivision (a), required respondent to notify all clients and any co-counsel of his suspension, deliver to all clients any papers or other property to which the clients were entitled, refund any unearned attorney fees, notify opposing counsel or adverse parties of his suspension, and file a copy of said notice with any court, agency or tribunal before which litigation was pending. Rule 955, subdivision (c), required respondent to file with the Clerk of the State Bar Court an affidavit showing that he had fully complied with the requirements of rule 955, subdivision (a).

Pursuant to the June 16, 2005, Supreme Court order, respondent was to have complied with subdivision (a) of rule 955 no later than August 15, 2005, and was to have complied with subdivision (c) of rule 955 no later than August 25, 2005.

On or about June 27, 2005, Probation Deputy Lydia Dineros of the Office of Probation of the State Bar of California (the "Probation Deputy") sent a letter to respondent informing him that he must comply with rule 955 and informing him that the affidavit showing that he had fully complied with rule 955 must be filed with the State Bar Court no later than August 25, 2005. Enclosed with the June 27, 2005, letter was a copy of the June 16, 2005, Supreme Court order, a copy of rule 955, and a copy of a form affidavit of compliance with rule 955. The Probation Deputy's letter was placed in a sealed envelope correctly addressed to respondent at his State Bar of California membership records address. The letter was mailed by first-class mail, postage prepaid, by depositing for collection by the USPS in the ordinary course of business.

On or about July 6, 2005, the USPS returned the Probation Deputy's June 27, 2005, letter marked, "Unable to Forward."

To date, respondent has failed to file with the Clerk of the State Bar Court the compliance

affidavit required by rule 955, subdivision (c).⁵

“Willfulness” in the context of rule 955 implies simply a purpose or willingness to commit the act, or make the omission, referred to. It requires neither bad faith nor an intent to violate the rule. (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.) The Supreme Court has disbarred attorneys whose failure to keep their official address current prevented them from learning that they had been ordered to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) The filing of an affidavit pursuant to rule 955(c) is required even if the respondent does not have any clients to notify. (*Id.*)

Based upon the foregoing, the court concludes that the State Bar has proven by clear and convincing evidence that respondent wilfully failed to comply with rule 955 of the California Rules of Court, as ordered by the Supreme Court in its order filed June 16, 2005, in Supreme Court matter S132783 (State Bar Court Case No. 03-O-03634; 03-O-03710; 03-O-03797) by failing to file an affidavit of compliance with rule 955. As a result of respondent’s wilful failure to comply with the order of the Supreme Court, he violated Business and Professions Code section 6103 which provides, in pertinent part, that the wilful violation or disobedience of a court order which requires an attorney to do or forbear an act connected with or in the course of his profession, which the attorney ought in good faith to do or forbear constitutes cause for suspension or disbarment.

MITIGATING/AGGRAVATING CIRCUMSTANCES

As respondent’s default was entered in this matter, respondent failed to introduce any mitigating evidence on his behalf, and none can be gleaned from the record.

In aggravation, respondent has a record of two prior impositions of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) (“standards”).) On June 16, 2005, the Supreme Court issued an order in Supreme Court matter S132783 (State Bar

⁵As of November 18, 2005, the date of the filing of the NDC in this matter, respondent had not filed with the Clerk of the State Bar Court the compliance affidavit required by rule 955, subdivision (c). Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of its records which reflect that as of the date of the filing of this decision, respondent still has not filed with the Clerk of the State Bar Court the compliance affidavit required by rule 955, subdivision (c).

Court Case No. 03-O-03634; 03-O-03710; 03-O-03797) suspending respondent from the practice of law for three years, staying execution of said suspension, and actually suspending respondent from the practice of law for six months and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure. In this prior disciplinary matter, in which respondent also failed to participate and in which his default was also entered, respondent was found to have improperly entered into a business transaction with a client in wilful violation of rule 3-300 of the Rules of Professional Conduct of the State Bar of California (“RPC”); intentionally, recklessly or repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A) of the RPC with respect to two client matters; failed to respond promptly to a reasonable status inquiry of a client in violation of section 6068, subdivision (m) of the Business and Professions Code; and failed to promptly refund any part of a fee paid in advance that had not been earned in wilful violation of rule 3-700(D)(2) of the RPC. In aggravation, it was noted that respondent engaged in multiple acts of misconduct; his conduct significantly harmed his clients; he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct; and his lack of candor and cooperation with the State Bar during the disciplinary proceeding was evidenced by his failure to participate prior to the entry of his default. In mitigation, it was noted that respondent had no prior record of discipline.

On March 17, 2006, the Supreme Court issued an order in Supreme Court matter S140113 (State Bar Court Case No. 04-O-12793) suspending respondent from the practice of law for three years, staying execution of said suspension, and actually suspending respondent from the practice of law for six months and until respondent makes and provides proof of specified restitution and until the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure.⁶ In this second prior disciplinary matter, in which respondent also failed to participate and in which his default was also entered, respondent was found to have improperly entered into a business transaction with a client in wilful violation of rule 3-300 of the RPC; and

⁶The court takes judicial notice of respondent’s prior record of discipline in Supreme Court matter S140113 (State Bar Court Case No. 04-O-12793).

failed to cooperate with a State Bar investigation in wilful violation of section 6068, subdivision (i), of the Business and Professions Code. In aggravation, it was noted that respondent had a prior record of discipline; his conduct significantly harmed his client; he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct; and his lack of candor and cooperation with the State Bar during the disciplinary proceeding was evidenced by his failure to participate prior to the entry of his default. No mitigating circumstances were found.

Respondent's lack of candor and cooperation with the State Bar during this disciplinary proceeding is evidenced by his failure to participate in this matter prior to the entry of his default. (Standard 1.2(b)(vi).)

DISCUSSION

The primary purpose of disciplinary proceedings conducted by the State Bar is to protect the public, the courts and the legal profession, the maintenance of high professional standards and the preservation of public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

Rule 955(d) provides in part that “[a] suspended member’s wilful failure to comply with the provisions of this rule constitutes cause for disbarment or suspension and for revocation of any pending probation.” Furthermore, standard 1.7(b) provides that where an attorney has two prior records of discipline, the degree of discipline imposed in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate. No mitigating circumstances were found in this matter.

Timely compliance with rule 955 of the California Rules of Court performs the critical function of ensuring that all concerned parties, including clients and co-counsels, opposing attorneys and the courts, learn about an attorney’s actual suspension from the practice of law. Compliance with this rule also keeps the State Bar Court and the Supreme Court apprised of the location of attorneys who are subject to their respective disciplinary authorities. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Disbarment is generally the appropriate sanction imposed for wilful violation of rule 955. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Similar discipline has been recommended by the State Bar Court Review Department. (*In the Matter of Babero* (Review Dept.

1993) 2 Cal. State Bar Ct. Rptr. 322.)

Respondent has demonstrated an unwillingness or an inability to comply with his professional obligations and the rules of conduct imposed on lawyers. This is exemplified by his failure to participate in these State Bar proceedings and by his failure to comply with rule 955. The court also notes that respondent failed to participate in his prior disciplinary matters. More importantly, respondent's failure to comply with rule 955 undermines the basic function that the rule serves, i.e., ensuring that all concerned parties learn about an attorney's suspension from the practice of law. (*Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1187.)

Respondent's disbarment is necessary to protect the public, the courts and the legal profession. His disbarment is also important to the maintenance of high professional standards and to the preservation of public confidence in the legal profession. It would undermine the integrity of the disciplinary system and damage public confidence in the legal profession if respondent were not disbarred for his wilful and unexplained disobedience of an order of the California Supreme Court.

RECOMMENDED DISCIPLINE

Based on the foregoing, it is hereby recommended that respondent **ROGER ALLEN GERDES** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days after the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) within 40 days after the effective date of the order showing his compliance with said order.

ORDER REGARDING INACTIVE ENROLLMENT

_____ Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Said inactive enrollment will be effective three days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, as provided for by rule 490(b) of the Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May ___, 2006

PAT McELROY
Judge of the State Bar Court